No. 1258

In the Supreme Court of the United States

OCTOBER TERM, 1946

WILBUR ROISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 62–66) is reported at 157 F. 2d 787.

JURISDICTION

The judgment of the circuit court of appeals was entered October 4, 1946 (R. 66–67), and a petition for rehearing was denied March 20, 1947 (R. 67). The petition for a writ of certiorari was filed April 17, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) F. R. Crim. P.

QUESTION PRESENTED

Whether in a prosecution for deserting a Civilian Public Service Camp the trial court committed reversible error in refusing to instruct the jury, as requested by petitioner, that the jury should return a verdict of not guilty if it found that petitioner's local board "erroneously" classified him.

STATUTE AND REGULATION INVOLVED

Section 5 of the Selective Training and Service Act of 1940, 50 U. S. C. App. 305, provides, in part:

> (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.

Section 622.44 of the Selective Service Regulations provided:

> 622.44 *Class IV–D: Minister of religion or divinity student.*—(a) In Class IV–D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment

of the Selective Training and Service Act (September 16, 1940).

* * * * *

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties. (6 F. R. 6610.)

STATEMENT

Petitioner registered under the Selective Training and Service Act with Local Board No. 1, Sunnyside, Washington, and in December 1941, he filed his selective service questionnaire. In that document he stated that he was twenty-two years old; that he had an eighth grade education; that for the past fifteen years he worked as a farmer; that he was ordained as a minister in the Jehovah's Witnesses sect in June 1940;[1] and that he desired classification in IV–D as a minister of religion.

Petitioner also filed a form letter from the Watchtower Bible and Tract Society which stated, *inter alia*, that he had been associated with the

[1] Petitioner stated in answer to one question that he had been an ordained minister for three years; in another answer he stated that he had been ordained in June 1940, approximately a year and a half before the questionnaire was filed.

sect since 1936; that he had been baptized in 1940; and that he devoted his "entire time" to his religious work. He also submitted an affidavit dated December 15, 1941, signed by his father which stated that petitioner was necessary to the operation of the father's farm.

He filed a conscientious objector's form on June 29, 1942, in which he claimed exemption from combatant and noncombatant military service. In this document he affirmed again that for the past fifteen years he had worked as a farmer. He stated also that he became a Jehovah's Witness in 1930, and that one Kenneth S. Hazen was his minister of religion.

Hazen informed the Selective Service System that the Sect's records of petitioner's religious activities showed that he worked the following number of hours in the months specified:

October	1942	28
November	1942	11
December	1942	47
January	1943	60
February	1943	69
March	1943	[2]21

Hazen informed the board that "to my knowledge Wilbur Roisum has also conducted up to five studies a month, necessitating twenty calls a month." According to Hazen, petitioner held office in the local company of Jehovah's Witnesses

[2] Hazen informed the board that petitioner had suffered a leg injury in this month, the inference being that this accounts for the low number of hours worked.

as "Assistant Company Servant," "Back Call Servant" and "Book Study Conductor."

On June 25, 1942, the local board classified petitioner in I–A–O, as a conscientious objector to combatant military service. Petitioner immediately appealed to his board of appeal. A hearing was held before a Department of Justice Hearing Officer, who filed a report recommending that petitioner's claim to exemption as a conscientious objector be sustained. Thereafter, on August 4, 1943, the board of appeal classified petitioner in IV–E, as a conscientious objector to all military service. Petitioner's subsequent request to the State Director that an appeal be taken to the President was rejected as not being necessary to avoid an injustice.

After several abortive attempts, petitioner, having been found physically acceptable for service, was ordered to report on May 23, 1944, to the local board for work of national importance. He reported and was transported to a Civilian Public Service Camp where he remained for five days. At his request, he was granted a weekend pass to leave camp and he never returned. (R. 35.)

On September 21, 1944, he was indicted (R. 2–3) in the United States District Court for the District of Oregon in one count charging that he deserted from the Civilian Public Service Camp, in violation of Section 11 of the Selective Training and Service Act. At petitioner's trial, the

Government established through the testimony of the local board clerk and the camp director that petitioner was finally classified IV–E, that he reported to a Civilian Public Service Camp, and that he deserted the camp. At petitioner's instance the entire selective service file was received in evidence as an exhibit offered by the Court (R. 27.)

Petitioner was the sole witness for the defense. He testified, *inter alia*, that he had desired classification in IV–D as a minister, not IV–E (R. 37). He related the various events before the Selective Service Boards and explained that he had reported to camp only to be in a position to challenge his classification by a habeas corpus proceeding, but he left camp without having resorted to habeas corpus (R. 36–42).

Petitioner offered no other evidence. None of his evidence was excluded by the court.[3] He made no motion for a directed verdict either at the close of the Government's case or at the close of all the testimony. The court refused a request to charge the jury that a verdict of not guilty should be returned if the jury found that the local board "erroneously classified defendant in class IV–E" (R. 50). Instead, the jury was instructed that

[3] Petitioner states (Pet. 6) that *de novo* testimony as to his ministerial activities was excluded by the court, but he cites no record references and we find nothing in the record to support the statement.

the board's classification was conclusive (R. 45). The jury returned a verdict of guilty (R. 4–5).

Thereafter a motion was filed on behalf of petitioner for a judgment of acquittal or for a new trial (R. 49). It was considered together with a similar motion of another defendant. The court granted the motion as to the other defendant because "I find no ground for the action of the Draft Board in classifying a man as a conscientious objector when he has not claimed it." The motion was denied as to petitioner because after carefully examining petitioner's selective service file the court determined that there was no invalidity in the classification and thus the motion had "no ground to support" it. (R. 50–51.) Petitioner was sentenced to imprisonment for two years (R. 5–6).

Upon appeal to the circuit court of appeals, the case was considered with two other cases (*Cox* v. *United States* and *Thompson* v. *United States*, Nos. 1256 and 1257, this Term), which also involved convictions for deserting from a Civilian Public Service Camp. In its first opinion, the circuit court of appeals reversed the judgments on the theory that the *Estep* decision controlled and that the defendants were entitled to have the jury pass on their ministerial claims (see Pet. 13–14). The Government's petition for rehearing informed the court that *Gibson* v. *United States*, 329 U. S. 338, was then pending in this Court for reargument and that the *Estep* de-

cision thus was not controlling. We further argued that the *Estep* decision permitted a judicial inquiry only into the jurisdiction of the local board and not into the correctness of the classification. The petition was granted, and upon reconsideration by the court, the judgments were affirmed because in each case there was substantial evidence to support the board's classification (R. 59–66).

ARGUMENT

None of the evidence which petitioner tendered in the trial court was rejected. The sole basis of petitioner's complaint is that the court refused the following requested instruction (R. 50):

> The Court hereby instructs you that if you find that Local Board #1, Yakima County, Sunnyside, Wash. erroneously classified defendant in Class IV-E, that their order issued to defendant to report to the C. P. S. Camp was void and your verdict should be "not guilty."

The *Estep* decision, 327 U. S. 114, 122, makes plain that the court did not err in refusing this instruction. For as the Court there said, "The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous." The *Estep* decision and the decision in *Gibson* v. *United States,* 329 U. S. 338, entitled petitioner to defend on the ground that "there is no basis in fact for the classification" or that the classification was not made in

conformity with the applicable selective service regulations. But petitioner offered no such defense in the district court. His sole claim, as the requested instruction to the jury illustrates, was that his classification was erroneous, a contention which was not a valid defense. It was not error for the district court to refuse the requested instruction, for it did not correctly state the law.

For the first time on motion for judgment of acquittal notwithstanding the verdict of the jury or in the alternative for a new trial, petitioner asserted the claim that his classification was the result of "arbitrary, capricious and unlawful conduct" by the classifying board (see R. 12–13). At this juncture, the trial judge examined petitioner's selective service file which was in evidence, and thereafter the motion was denied because the court concluded that the classification was not unlawful (R. 51). The fact that in a companion case the court granted a motion for judgment of acquittal because "I find no ground for the action of the Draft Board" (R. 51) suggests the nature of the court's approach to petitioner's motion.

The circuit court of appeals also had the selective service file before it, and the court concluded that there was substantial evidence in the file to support the classification (see R. 63–66).

We agree with both courts below that there was abundant evidence before the selective service boards which justified their refusal to classify

petitioner as a minister. The evidence before the boards, which we have summarized in the statement, *supra*, pp. 3–5, shows that petitioner was a boy of twenty-two who since early childhood had worked as a farm hand on his father's farm. He described his occupation as that of a farm hand for the past 15 years. His father informed the board that he was essential to the farm. His religion was that of the Jehovah's Witnesses. He recognized the local leader of the sect, Kenneth S. Hazen, as his minister of religion. For his participation in the activities of the sect, petitioner "witnessed" for varying periods of time, depending upon how much time he could spare from his farm work. The records of the sect showed that he devoted as little as 11 hours to Jehovah's Witness activities in the month of November 1942, and that the most time he devoted to these activities was 69 hours for the entire month of February 1943. There is no evidence that petitioner's status in the sect was any different from that of any other member of the sect. He was not the leader of the local unit; he was merely a member who in his spare time practiced his religion by witnessing. Without repeating the arguments which were made to the Court in the *Kulick* (No. 840, this Term) and *Sunal* (No. 535, this Term) cases, we think it plain that, unless it can be said that all Jehovah's Witnesses are ministers within the meaning of the Selective Training and Service Act, it cannot

be contended that there is no basis in fact for the board's refusal to classify petitioner as a minister of religion. Accordingly, we submit that both courts below correctly held that the induction order is valid and that petitioner has been properly convicted for deserting from the Civilian Public Service Camp to which he had reported.[4]

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1947.

[4] *Poole* v. *United States*, 159 F. 2d 312 (C. C. A. 4), relied upon by petitioner as being in conflict with the decision below (see Pet. 11), held that a member of a Civilian Public Service Camp who was prosecuted for deserting the camp was entitled to defend on the ground that the local board exceeded its jurisdiction and that it was error for the trial court to exclude evidence as to this issue. The case is unlike petitioner's case, for here all of petitioner's proffered evidence was received by the trial court and both courts below determined that the local board did not exceed its jurisdiction.

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